**ARKANSAS COURT OF APPEALS**
**NOT DESIGNATED FOR PUBLICATION**
**JOHN MAUZY PITTMAN, CHIEF JUDGE**

DIVISION I

CA05-1010

May 2, 2007

KOSCHA PHILLIPS, ET AL.
APPELLANTS

V.

CAVANAUGH FREE WILL BAPTIST CHURCH, INC.
APPELLEE

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CV-04-601]

HON. J. MICHAEL FITZHUGH, JUDGE

AFFIRMED

This is a tort case in which Koscha Phillips, on behalf of herself and her three-year-old daughter S.P., alleged that S.P. was injured at appellee's daycare facility as a result of appellee's gross negligence in failing to adequately supervise the children as they were using an elevated playground device, and in failing to adequately inspect S.P. for injuries after she was pushed from the playground device by a three-year-old boy who also attended the daycare facility. Koscha signed a release upon S.P.'s enrollment relieving appellee of liability for anything less than gross negligence. The question on appeal is whether the trial court erred in granting summary judgment to the daycare on the grounds that the daycare's behavior did not rise to the level of gross negligence.

In reviewing a summary-judgment case, we need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Aka v. Jefferson Hospital Association*, 344 Ark. 627, 42 S.W.3d 508 (2001). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997).

The key issue is whether the definition of gross negligence differs where liability, rather than punitive damages, is the issue to be decided. Without a doubt, the definitions that have been applied differ, and still another definition is set out in the criminal code for certain offenses. Appellant argues that the trial court erred in applying a definition of gross negligence that incorporated an element of intent. That definition was drawn from the case of *Doe v. Baum*, 348 Ark. 259, 72 S.W.3d 476 (2002), in which the supreme court held that there was no genuine issue of material fact to show gross negligence on the part of a school bus driver where a child was raped on the school bus that he was driving. That case presents facts so similar to the one now before us as to merit quotation at length:

> *Black's Law Dictionary* defines "gross negligence" as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." *Id*. at 1033. *Black's Law Dictionary* defines "reckless negligence" as being when "the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so

great as to make it highly probable that harm would follow." *Id.* at 1034.

Here, viewing the proof in the light most favorable to appellants, we cannot say that Baum's [the bus driver's] conduct rose to the level of gross negligence or reckless indifference. There is no evidence showing that Baum intentionally failed to perform a manifest duty in reckless disregard of the consequences as affecting the life of Mary, nor that he intentionally performed an act of an unreasonable character in disregard of a risk to Mary that was known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It is not controverted that Mary did not try to call out to or try to run to her brother, did not call out to or try to run to the bus driver, did nothing to try to get away from James, did nothing to try to bring the incident to the attention to the other students on the bus, and did not tell anyone about the incident after she got off the bus.

Appellants asserted that Baum was grossly negligent or recklessly indifferent because Baum knew that James was a problem student that he had to keep his eye on and failed to do so. However, appellants failed to provide any evidence that such a failure was in any way intentional. Rather, appellants' deposition testimony shows that one grandparent conceded that things could happen on a school bus that a driver could not see, and the other grandparent stated that she could not contend that Baum intentionally tried to harm Mary, but that she thought that he just "wasn't watching those children when he should have been." Additionally, Mary admitted in her deposition testimony that Baum did not know what James was doing to her.

Appellants also asserted that Baum was grossly negligent or recklessly indifferent because of his knowledge of an incident during the prior year when Mary complained to Baum that another student, Kenny, had improperly touched her. Appellants contended that such earlier incident put him on notice that inappropriate sexual conduct had occurred on the bus. However, there was no evidence of an intentional failure to perform a manifest duty or intentional performance of an act with disregard of a known or obvious risk as a result of the

> earlier incident. Appellant does not cite any authority, and we know of none, that holds that an incident involving another student during the previous year establishes that a failure to observe or respond to an unobserved incident a year later rises to the level of gross negligence or reckless indifference. Appellants have failed to provide evidence to support the allegation that Baum intentionally failed to perform a manifest duty or act with disregard of a known or obvious risk on the day the incident occurred with regard to James. Applying our standard of review of summary-judgment cases to the present case, we hold that there exists no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law on the issues of gross negligence and reckless indifference.

*Doe*, 348 Ark. at 278-79, 72 S.W.3d at 487; *see also Key v. Coryell*, 86 Ark. App. 334, 185 S.W.3d 98 (2004).

Under this analysis, we cannot say that the trial court erred by granting summary judgment on the grounds that there was no evidence of an intentional failure on the part of the daycare to perform a manifest duty. There was evidence that the three-year-old who pushed S.P. off of the playground equipment had behavioral problems involving aggression toward daycare personnel and other children, but there was nothing to show that these problems were so unusual or severe that there was a manifest duty on the part of the daycare to segregate the boy from the other children during supervised play.

Koscha Phillips also argues that the trial judge erred in granting summary judgment to appellee with respect to her claim that appellee was grossly negligent in failing to obtain immediate medical care for S.P. after she fell. The uncontroverted evidence is that, after crying and reporting the incident to the supervising daycare worker, the child was comforted, stopped crying, took a nap, and did not mention the incident again until her mother came to

pick her up. Although there was evidence that S.P. incurred a painful labial tear as a result of the fall, there was no evidence that the child reported any bleeding or that bleeding was apparent until she pulled down her pants to show her mother. Finally, the evidence showed that the injury, although painful and somewhat serious, was not life-threatening and did not require extensive medical attention. We hold that, in the absence of any overt sign that this was anything more than a normal playground bump and bruise, there was no genuine issue of material fact regarding the allegation of intentional failure to perform a manifest duty in reckless disregard of the consequences affecting the life of the child, and that the trial court therefore did not err in granting summary judgment to appellee.

Affirmed.

HART and BIRD, JJ., agree.